Nos. 92-767 and 92-593

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The district court found that the State of Florida's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The court nonetheless adopted the same plan as the "remedy" for this violation. The questions presented are:

1. Whether the district court erred when it refused to conduct remedial proceedings concerning the possibility of providing complete relief for the Section 2 violations it had found, and instead summarily adopted as a permanent remedy the very plan it had found violated Section 2.

2. Whether the district court erred in failing to provide complete relief to Hispanic voters for Section 2 violations because doing so might result in the loss of an African-American "influence" district.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the defendants were T.K. Wetherell, Speaker of the Florida House of Representatives; Gwen Margolis, President of the Florida Senate; Lawton Chiles, Governor of the State of Florida; Robert A. Butterworth, Attorney General for the State of Florida; Peter R. Wallace, Chairman of the House Reapportionment Committee; Jack Gordon, Chairman of the Senate Reapportionment Committee; and Jim Smith, Secretary of State for the State of Florida.

In the consolidated case of *De Grandy* v. *Wetherell*, No. 92-40015-WS, Miguel De Grandy, Mario Diaz-Balart, Andy Ireland, Casimer Smericki, Van B. Poole, Terry Ketchel, Roberto Casas, Rodolfo Garcia, Jr., Luis Rojas, Lincoln Diaz-Balart, Javier Souto, Justo Luis Poso, Alberto Cardenas, Rey Velazquez, Luis Morse, Alberto Gutman, Karen E. Butler, Sgt. Augusta Carter, Jean Van Meter, Anna M. Pinellas, Robert Woody, Gina Hahn, Bill Petersen, Terry Kester, Margie Kincaid, and Brooks White were plaintiffs in the district court. T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Gwen Margolis, in her official capacity as President of the Florida Senate, Lawton Chiles, in his official capacity as Governor of the State of Florida, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee, Jim Smith, in his official capacity as Secretary of State of Florida, and Robert Butterworth, in his official capacity as Attorney General of Florida, were defendants in the district court.

In the consolidated case of *Florida State Conference of NAACP Branches* v. *Chiles*, No. 92-40131-WS, the plaintiffs were Florida State Conference of NAACP Branches, T.H. Poole, Sr., Whitfield Jenkins, Leon W. Russell, Willye Dennis, Turner Clayton, Rufus Brooks, Victor Hart, Kerna Iles, Roosevelt Walters, Johnnie McMillian, Phyllis Berry, Mary A. Pearson, Mable Butler, Iris Wilson, Jeff Whigham, Al Davis, Peggy Demon, Carlton Moore, Richard Powell, Neil Adams, Leslie McDermott, Robert Saunders, Sr., Irv Minney, Ada Moore, Anita Davis, and Calvin Barnes. The defendants were Lawton Chiles, in his official capacity as Governor of Florida, Jim Smith, in his official capacity as Secretary of State of Florida, Robert Butterworth, in his official capacity as Attorney General of Florida, Gwen Margolis, in her official capacity as President of the Florida Senate, T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, and Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee.

The court below also granted the following persons and organizations leave to act as amicus curiae: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; The Coalition of Hispanic Women; and State Representative Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William; State Representa-

tives Darryl Reaves, Corinne Brown and James T. Hargrett; United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 794 F. Supp. 1076.

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[1] All references to the J.S. App. are to the Appendix to the jurisdictional statement in No. 92-767, *United States* v. *Florida*. The district court's judgments (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a), however, are identically paginated in the Appendix to the jurisdictional statement in No. 92-519, *Johnson* v. *De Grandy*.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 4a-6a) was entered on July 2, 1992. A notice of appeal was filed on July 31, 1992. J.S. App. 106a-107a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. This Court noted probable jurisdiction on February 22, 1993. 113 S. Ct. 1249.

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

In response to the 1990 census, the State of Florida adopted redistricting plans for the Florida Senate and the Florida House of Representatives. A three-judge district court found that the Senate plan violated the rights of Hispanics and African-Americans under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The court, however, then adopted that very plan as a permanent remedy for those violations. The United States and a group of private plaintiffs (the De Grandy plaintiffs) have filed appeals from that judgment. The three-judge court also found that the Florida House of Representatives redistricting plan violated the Section 2 rights of Hispanics and adopted a plan to remedy that violation. House officials have appealed from that judgment. This Court consolidated all three appeals and noted probable jurisdiction. 113 S. Ct. 1249 (1993). In this brief, we address the issues raised by the appeals from the district court's judgment concerning the Florida Senate redistricting plan, *United States* v. *Florida*, No. 92-767, and *De Grandy* v. *Johnson*, No. 92-593.

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights Act. The United States alleged that the Senate plan fragments Hispanic population concentrations in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only three Senate districts.

J.A. 75. The complaint further alleged that if districts in the Dade County area "respect[ed] communities of interests and follow[ed] other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in * * * one additional district." J.A. 76. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77.

The United States' suit was consolidated with two other redistricting suits. One was filed by the De Grandy plaintiffs, who had made allegations similar to those made by the United States. The other was filed by the NAACP and several individuals, who had challenged the continued use of the plan that predated the 1990 Census. J.S. App. 12a, 18a-20a. A three-judge district court assumed jurisdiction over the consolidated cases. See *id.* at 12a, 19a & n.10.

On June 26, 1992, the United States sought a preliminary injunction against the use of the State's Senate redistricting plan in the upcoming primaries. I Tr. 52-53. Rather than acting on that request, the district court decided to conduct an expedited trial on the merits. J.S. App. 19a.

At trial, the NAACP alleged for the first time that the State's plan violated the Section 2 rights of African-Americans because it created two Senate districts in which African-Americans constituted a voting majority, while three such districts should have been created. J.A. 430-431. The district court

initially ruled that the NAACP's claim was untimely. J.A. 436. The court explained that "to affirmatively propose the three districts * * * catches everyone by surprise, and that's unfair in our judgment." *Ibid.* The court further stated that it would "limit [the NAACP's] presentation of evidence solely to the issue of the regression effect [that] the establishment of the fourth super-majority or majority Hispanic district[] * * * might have on the black districts." *Ibid.*[2] The court thus refused to admit the NAACP's alternative Senate plan into evidence. *Ibid.* After subsequent witnesses referred to the plan in their testimony, counsel for the NAACP again offered the plan into evidence. VI Tr. 185. The court then admitted the plan. VI Tr. 185-188. At closing argument, the NAACP argued that the evidence established that the State's failure to create a third African-American majority district violated Section 2. J.A. 473-475.

2. On July 1, 1992, at the conclusion of trial, the district court ruled that none of the plaintiffs were entitled to the relief they sought with respect to the Senate plan. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a-76a.[3]

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[2] Later the same day, counsel for the NAACP acknowledged that "we were basically precluded from going forward with our Section 2 case. That's an issue for another day." III Tr. 193.

[3] The July 2 judgment stated that "[t]he state of Florida's state senatorial districts * * * do not violate Section 2 of the Voting Rights Act of 1965" and ordered that "[t]he defendants * * * shall * * * conduct state senatorial elections in 1992" and "in years after 1992" in accordance with the state plan. J.S. App. 5a. When the court issued its opinion on

Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court concluded that the State's plan violates the Section 2 rights of both Hispanics and African-Americans. The court found that while the State's plan creates three districts in which Hispanics would constitute a voting majority and two districts in which African-Americans would constitute a voting majority, each group is sufficiently large and geographically compact to constitute a voting majority in one additional district. J.S. App. 40a-44a & n.30, 54a-55a. The State's plan fails to create either of the additional districts, the court found, instead fragmenting the Hispanic and African-American populations in Dade County. *Id.* at 55a-56a, 59a-60a.

The court also found that Hispanics and African-Americans are each "politically cohesive among themselves" and that both are victims of bloc voting. J.S. App. 44a-53a. Specifically, the court found that whites in combination with African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics, unless those candidates run in

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July 17, it noted that "[w]e held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act." J.S. App. 72a. The court explained that

> [t]his language should be read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, *although the Florida Senate plan violates Section 2 of the voting rights act*, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

Ibid. (emphasis added). See J.S. 9 n.7; U.S. Br. in Opp. to Motion to Dismiss or Affirm 1-3.

districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a. Similarly, it found that whites together with Hispanics usually vote sufficiently as a bloc to defeat African-American sponsored candidates. *Id.* at 52a-53a.

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. Tensions among the three groups, the court noted, have caused "ethnic factors * * * [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against both Hispanics and African-Americans. *Id.* at 53a-54a. The court noted that although there was disagreement "as to whether Hispanics or African-Americans bore more of the brunt of discrimination, everyone agreed that both groups had suffered." *Id.* at 54a.

Based on those findings, the court concluded that the "'totality of the circumstances' show that * * * Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a.

3. Having determined that the State's Senate plan violates the Section 2 rights of Hispanics and African-Americans, the court nonetheless ordered that the Senate plan itself be put into effect as a remedy. The court acknowledged that, given the nature of the violation, the preferred remedy "would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts." J.S. App. 60a. Although the court did not hold a remedial hearing, it concluded that such a 4-3 plan was "not a viable option." *Id.* at 60a.

In reaching that conclusion, the court relied upon testimony from the State's redistricting expert, who stated that "[i]t's amazing * * * what you can do with these computers," that he "would believe" that a 4-3 plan was possible, and that it depends on "how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that." J.S. App. 60a (quoting J.A. 331). That witness also stated that, although he had not attempted to develop a 4-3 plan, he thought it would be "very difficult to do that." J.A. 337. The court also cited a statement by NAACP counsel that "it is technically feasible to draw a four and three, but we were completely unable [after approximately ten hours of work] to get the percentages of the districts up to a level that I believe the parties will find acceptable." J.A. 342; see J.S. App. 61a.

As the court saw the situation, it could remedy the violation against Hispanics by drawing a plan with four Hispanic majority districts, or it could remedy the violation against African-Americans by drawing a plan with three African-American majority districts, but it could not do both. J.S. App. 63a. Under those circumstances, the court concluded that the State's plan struck the "fairest balance." *Id.* at 64a. The court described the State's plan as a "compromise" that created three Hispanic majority districts, two African-American majority districts, and one African-American "influence district." *Ibid.* Although African-Americans would constitute only 35.5% of the VAP in the "influence district," the court found that African-Americans could "elect a candidate of their choice because of strong minority

coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." *Id.* at 65a.

The court preferred the State's plan over Plan 180 (the Reaves Hargrett Brown plan), which had been introduced by another group of plaintiffs. That plan included four Hispanic majority districts, two African-American majority districts, and an African-American influence district in which African-Americans constituted 47.1% of the VAP. J.S. App. 61a-63a. The court concluded that Plan 180 had a "retrogressive" effect upon African-Americans when compared to the State's plan. *Id.* at 63a. Based on an analysis of voter turnout, the court determined that Plan 180's influence district would not be an "African-American majority seat." *Ibid.* For that reason, the court concluded that the influence district was "ineffective." *Ibid.* Believing the State's plan to be the "fairest to all the ethnic communities in Dade County and the surrounding areas," the court "impose[d] that plan as the remedy in this case." *Id.* at 66a.

4. Immediately after the court issued its ruling from the bench, the De Grandy plaintiffs moved for reconsideration. In support of the motion, the De-Grandy plaintiffs informed the court that they had prepared a plan for the remedial phase of the case that created four majority Hispanic and three majority African-American districts. J.A. 482. The court denied that motion without explanation. *Ibid.*

SUMARY OF ARGUMENT

Once it has found a violation of law, the court in a voting rights case, as in any other case, must attempt to provide the plaintiffs with a remedy. In this case, however, the district court found two distinct violations of Section 2 of the Voting Rights Act—as to Hispanics and as to African-Americans—yet it failed even to hold a hearing to determine the feasibility and content of a remedy for either violation. In our view, a complete remedy for both violations was possible, and the court erred in refusing to hold a hearing to consider the question.

The court justified its refusal to hold a hearing on the ground that, based on evidence introduced at the liability phase of the trial, providing a remedy for either violation would have been inconsistent with remedying the other. The evidence on which the court relied to reach that conclusion was entirely inadequate. More importantly, however, the court had no basis for assuming that evidence at the liability phase of the trial was sufficient to determine whether a complete remedy was possible. Plaintiffs had never been informed that they were required to show that remedying the violations they alleged would be consistent with remedying different, and theretofore unproved, violations alleged by other parties. Nor should any of the plaintiffs have been expected to make such a showing as part of their proof of the Section 2 violations that they alleged. As a result, the question whether a complete remedy was possible was never fully and fairly litigated. The court erred in refusing to permit evidence and argument on that question before adopting as a "remedy" the very plan that embodied the Section 2 violations.

ARGUMENT

THE DISTRICT COURT ERRED IN SUMMARILY ADOPTING AS A PERMANENT REMEDY THE VERY PLAN IT FOUND IN VIOLATION OF SECTION 2, WITHOUT HOLDING A HEARING TO DETERMINE WHETHER MORE COMPLETE RELIEF WAS POSSIBLE

Applying this Court's decision in *Gingles*, the district court found that the State of Florida's Senate redistricting plan violated the Section 2 rights of both Hispanics and African-Americans. This appeal does not raise any question concerning those liability determinations. Rather, this appeal relates solely to the court's approach to remedying those violations.

The proper approach to remedying a Section 2 violation is no different from the proper approach to remedying a violation of any other federal right. Guided by "well-known principles of equity," *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), a court must seek to provide complete relief. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-771 (1976); *White* v. *Weiser*, 412 U.S. 783, 797 (1973); *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971). In a Section 2 case, that means that "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982); see also *McGhee* v. *Granville County*, 860 F.2d 110, 118 (4th Cir. 1988).

Because of the imperative that the court provide complete relief if possible, it is particularly important

that the court afford the parties a full opportunity to introduce evidence on that issue before making its own findings. As this Court's decisions make clear, the State must be given an opportunity to submit a plan that remedies the violation. If the State submits such a plan, the court is required to defer to it. *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); see *McGhee*, 860 F.2d at 115. But when the State's plan does not provide complete relief, the court is not excused from its obligation to remedy the violation as completely as possible. If the court concludes that the State's plan is inadequate and that a more complete remedy is possible, it must fashion its own remedial plan. *Connor* v. *Finch*, 431 U.S. at 415; *Chapman* v. *Meier*, 420 U.S. at 27.

The court need not follow a rigid procedure in determining whether the State's remedy is adequate and whether a more complete remedy is possible. If those issues have been fully and fairly litigated during the liability phase of the trial, the court need not conduct a special remedial hearing afterwards. But if those issues have not been adequately litigated, the court may not simply enter a final judgment adopting an inadequate state plan. It must give the plaintiffs a chance to show that complete relief is possible. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977) (when remedial issues have not been fully litigated during trial, court must conduct additional proceedings to determine scope of relief).

1. In this case, the district court never gave plaintiffs the opportunity to establish that it was possible to fashion a remedy for the violation they had alleged and proved. After hearing closing argument on liability, the court recessed briefly. J.A. 476. Upon its return, the court announced that "the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the *Gingles* standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida." J.A. 477. The court concluded that "under Supreme Court precedent, this Court must give deference to the state policy as expressed in" the State's redistricting plan. *Ibid.* The court then announced that it would issue a judgment on the Senate case immediately. *Ibid.* After a brief colloquy, the court clarified that it "has at this time ruled against all plaintiffs * * * as to the Senate." J.A. 482. The De Grandy plaintiffs immediately moved for reconsideration, noting that they "ha[d] a plan prepared for the remedial portion, had we got to that, that would show four Hispanic districts * * * and three black districts." *Ibid.* The court denied the motion summarily, *ibid.*, and heard no further evidence or argument regarding the Senate claims.

In its written opinion, the court clarified the basis for its ruling. The court found that the State had violated Section 2 by failing to draw a fourth Hispanic majority district and by failing to draw a third African-American majority district, and the court acknowledged that the "ideal" remedy for those violations would have been a 4-3 plan. J.S. App. 60a. In the court's view, however, such a remedy was not possible. *Ibid.* For that reason, the court explained, it had imposed as a permanent remedy the

very State plan it had just found in violation of Section 2. J.S. App. 63a-66a.

The district court was wrong to give up so quickly on the possibility of formulating a 4-3 plan, or at least on attempting to formulate a plan that would remedy one of the violations. In doing so, the court relied on the testimony of the State's redistricting expert. J.S. App. 60a. But the State's expert did not testify that it would be impossible to devise a 4-3 plan. Rather, he expressed an opinion that it would be "very difficult" to fashion such a plan, J.A. 337, and he disclaimed any ultimate opinion by stating, in response to the court's inquiry, that "[i]t's amazing, Your Honor, what you can do with these computers." J.A. 331; see J.S. App. 60a. The court also cited (J.S. App. 61a) the statement of NAACP counsel that he had spent "approximately ten hours" trying to develop such a plan and had not succeeded. J.A. 342. A statement of counsel, however, is not evidence, and the fact that he could not develop an acceptable plan in ten hours hardly supports the conclusion that no such plan could be developed at all. The district court therefore did not have sufficient evidence before it to conclude that a 4-3 plan would be impossible.

More importantly, however, the court's resolution of this issue was procedurally flawed. The court never informed the parties that it would determine the feasibility of a 4-3 plan on the basis of evidence introduced during the liability phase of the trial. The only discussion of that issue occurred when the court itself initiated some brief questioning on that subject directed to the State's redistricting expert. J.A. 331. All concerned clearly understood the court's questioning to be a preliminary inquiry into an issue that

would be litigated during the remedial phase of the trial in the event the court ultimately concluded that the State's plan violated the Section 2 rights of both Hispanics and African-Americans. IV Tr. 8, 205-210; see also J.A. 436, 438, 482. By failing to conduct such a remedial hearing, the district court deprived the United States and the De Grandy plaintiffs of any opportunity to show that complete relief was possible.

Neither the United States nor the De Grandy plaintiffs ever waived their right to a hearing directed to that issue. To the contrary, as noted above, immediately after the court ruled from the bench, the De Grandy plaintiffs moved for reconsideration and informed the court that they had prepared a 4-3 plan for the remedial phase of the trial. J.A. 482. The district court refused to schedule such a hearing, even though the De Grandy plaintiffs were prepared to show that what the district court viewed as impossible could in fact be done.

The district court's decision to dispense with remedial proceedings cannot be justified on the theory that the United States was required to show that a 4-3 plan was possible in order to prove liability. In *Gingles*, this Court held that, in order to establish a Section 2 violation, a plaintiff must show that a remedy is possible for the violation it has alleged. 478 U.S. at 50 & n.17. Because the United States in this case claimed that the State violated the Section 2 rights of Hispanics by failing to draw a fourth Hispanic majority district, the United States had to show that such a district could be drawn. As the district court found, the United States satisfied that burden. J.S. App. 57a-58a. Although the NAACP alleged that the State violated the Section 2 rights of

African-Americans by failing to draw a third African-American majority district, neither the United States nor the De Grandy plaintiffs made such an allegation. Nothing in *Gingles* requires a plaintiff to make a threshold showing that it is possible to remedy both the violation it has alleged and a distinct violation alleged by another party.

2. Appellees have tried to defend the district court's decision on a different ground. They have argued that the parties were on notice of the need to draw a 4-3 plan because the court ruled at trial that it would consider whether the creation of a fourth Hispanic majority district would have a "regressive" effect upon African-Americans. Motion to Dismiss or Affirm 27. Appellees are mistaken.

The issue raised by the court was whether the creation of a fourth majority Hispanic district would result in less opportunity for African-Americans to elect candidates of their choice than would the State's plan. The State's plan had two African-American majority districts and one African-American "influence" district in which African-Americans constituted 35.5% of the VAP. J.S. App. 64a-65a. Accordingly, to satisfy the concern raised by the court, it would only have been necessary for the plaintiffs to show that it was possible to devise a plan with four Hispanic majority districts, while preserving two African-American majority districts and one African-American influence district. The plaintiffs met that burden when they introduced Plan 180. As the district court found, that plan included four Hispanic majority districts, two African-American majority districts, and an African-American influence district in which African-

Americans constituted 47.1% of the VAP—a percentage well in excess of that under the State's plan. J.S. App. 61a-62a.

The district court found that the State's plan had an *effective* influence district, but that Plan 180 did not. J.S. App. 63a, 65a-66a. Accordingly, the court found that Plan 180 had a "retrogressive" effect upon African-Americans. J.S. App. 63a. In making that finding, however, the court applied a different and more stringent legal standard to the influence district in Plan 180 than it did to the influence district in the State's plan.

In gauging the effectiveness of the State's influence district, the court asked whether there would be sufficient crossover from white and Hispanic voters to permit African-Americans to elect candidates of their choice, even though they constituted a voting minority. J.S. App. 65a. As this Court indicated in *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1155, 1157 (1993), that is the proper standard for judging the effectiveness of an influence district.

The district court did not apply that standard to the influence district in Plan 180. To do so would have required the court to inquire whether there was sufficient crossover voting by whites and Hispanics to permit African-Americans to elect the candidates of their choice in that district, even though they would constitute a minority of the voting age population. Yet the court did not undertake that inquiry. Instead, it employed the State's expert's "turnout test," VI Tr. 136, see J.A. 469-470—which looked to whether African-Americans would constitute a majority of the voters who actually turned out on election day—to determine whether Plan 180 created a

third "African-American *majority* seat in South Florida." J.S. App. 63a (emphasis added).

Had the court applied the correct legal standard, it would have concluded that the influence district in Plan 180 was just as effective as the one in the State's plan. Because of the presence of Hispanic noncitizens in Plan 180's influence district, African-Americans (who constitute 47.1% of the VAP, see J.S. App. 62a) are probably at least very close to a majority of the eligible voters. Moreover, because the African-American VAP in the Plan 180 influence district is 11.6 percentage points higher than the 35.5% African-American VAP in the State's influence district, see J.S. App. 65a, African-Americans would need a far lower level of crossover voting to elect candidates of their choice. Finally, the evidence shows that African-American sponsored candidates would have won had they run in Plan 180's influence district. See Humphrey Intervenor Exh. 4 (District Summary Selected Statewide Races with Black candidates, p. 2—District 28) (congressional redistricting hearings).

Thus, even if the district court could have dispensed with a remedial hearing if Plan 180 was "regressive," the court applied the wrong analysis in concluding that it was regressive. Accordingly, the judgment below, as it concerns the State Senate, cannot be supported on the basis of the alternative rationale proffered by the State.

3. More fundamentally, once the district court determined that the State's plan violated the Section 2 rights of Hispanics and African-Americans, the relevant question was not whether Plan 180 had an effective African-American influence district, but whether it was possible to fashion a remedial plan

containing four Hispanic majority districts and three African-American majority districts. Because the parties never had an opportunity to address that distinct question, the district court erred in failing to conduct remedial proceedings and in summarily entering a judgment that remedied neither violation.

It is true that the district court was operating under severe time constraints because of the need to decide whether the State's plan could be used in the upcoming primaries. A remedial hearing to determine whether a 4-3 plan was possible (and, if not, what remedy would be appropriate) could have been difficult to finish in time for the 1992 elections. The court thus might have been justified in permitting the State's plan to be used as an interim plan for those elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (when elections are imminent, district court has authority to permit them to be held under plans "that do not in all respects measure up to the legal requirements").

In this case, however, the district court not only allowed the State's plan to be used in the 1992 elections, but also entered a final judgment ordering the State to continue using that plan for future elections. The court was not justified in entering that judgment without first conducting fully adequate remedial proceedings to determine whether more complete relief was possible.

CONCLUSION

The district court's remedial order should be reversed and the case should be remanded with directions to conduct further proceedings to determine the proper remedy for future elections.

Respectfully submitted.

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